1949

Edwin N. Haws, Mildred Haws, Allie Haws, Hermoine Haws Rose, Garland H. Haws, Lucinda A. Haws Ballam v. John P. Jensen : Appellant's Brief

Utah Supreme Court

Newel G. Daines; L. Delos Daines; Clinton D. Vernon; Attorneys for the Defendant and Appellant;

Case No. 7267

In the Supreme Court of the State of Utah

EDWIN N. HAWS, MILDRED HAWS, ALLIE HAWS, HERMOINE HAWS ROSE, GARLAND H. HAWS, LUCINDA A. HAWS BALLAM,

Plaintiffs and Respondents,

vs.

JOHN P. JENSEN

Defendant and Appellant.

APPELLANT'S BRIEF

NEWEL G. DAINES
L. DELOS DAINES
CLINTON D. VERNON
Attorneys for the Defendent and Appellant

INDEX

INDEX OF AUTHORITIES

TEXTS CITED

STATUTES CITED

In the Supreme Court of the State of Utah

EDWIN N. HAWS, MILDRED HAWS, ALLIE HAWS, HERMOINE HAWS ROSE, GARLAND H. HAWS, LUCINDA A. HAWS BALLAM,

Plaintiffs and Respondents,

vs.

JOHN P. JENSEN

Defendant and Appellant.

Case No. 7267

APPELLANT'S BRIEF

PRELIMINARY STATEMENT OF FACTS

This appeal is taken from the Decree of the Honorable Marriner M. Morrison, former judge of the District Court of the First Judicial District in and for Cache County, State of Utah, whereby and wherein on the 17th day of August, 1948, he entered judgment in favor of the plaintiffs and against the defendant thereby imposing a trust on a Warranty Deed which was absolute and unconditional on its face. (Exhibit "A," TR. 2, 4, 5, 26-30).

This was a suit in equity and the appeal is upon both the law and facts.

PLEADINGS

That part of the complaint pertinent to the discussion herein is as follows:

That on or about the 18th day of August, 1927, Maria Anderson Haws executed a Warranty Deed to one Amber Haws for and in consideration of $1.00, love and affection, conveying the property in question. That Maria Anderson Haws died on the 24th day of March, 1939, leaving as her heirs at law the plaintiffs and Amber Haws, the grantee. At her direction the deed was recorded in the office of County Recorder, Cache County, Utah, on the 2nd day of December, 1933. That prior to and at the time of execution of the deed and following its execution and at the time of its recording and delivery the grantor intended that the grantee would take the said property as trustee for the use and benefit of the grantor and all of her children and the grandchildren of one of her deceased sons. That the conveyance of the property, while in the form of a warranty deed, was to create an *oral* trust. That the terms of said trust provided that the trustee should hold and maintain said property as a family home to be used by the grantor and/or her children or the children of the said children then living for so long as any of the said persons should need a home with complete discretion in the trustee as to which of said persons should use said property. That the beneficiaries under said trust were the plaintiffs herein. That the grantee knew of the terms of said trust and the intention of the grantor in executing said deed and that shortly after is execution and delivery the grantee accepted the trust and proceeded to perform and carry out the terms thereof in

accordance with the spirit, desire and intention of the grantor; that she carried out the terms of the said trust until her death.

That the grantee during the month of April, 1939, married the defendant herein and was known thereafter as Amber Haws Jensen, that on the 16th day of March, 1945 she died; that at the time of the defendant's marriage with the grantee and at all times thereafter he knew of the existence of the trust and that he had recognized the existence of said trust at diverse times and upon diverse occasions, and that as a fraud upon the plaintiffs and with full knowledge of the existence of said trust now refuses to permit any of the plaintiffs to enter upon said property and that he refuses to recognize the validity of the trust and claims said property by right of succession, free and clear of said trust and all of the equities of the plaintiffs herein.

That the property in question was distributed to the defendant as the sole heir at law of Amber Haws Jensen, the grantee, on the 13th day of February, 1947. (TR. 3-6).

DEMURRER

To the complaint, the defendant filed a general demurrer on the grounds that the complaint did not state sufficient facts to constitute a cause of action and that said action was barred by Chapter 5 of U.A.C. 1943, Section 33-5-1 and other sections applicable thereto. (TR. 7). The demurrer was argued and subsequently overruled by the court. (TR. 7, 35).

AMENDED ANSWER

Defendant admitted the execution and delivery of the deed by its recording, the death of both the grantor and

grantee, admitted the marriage of grantee and defendant and that the defendant was the surviving heir of the grantee, and that the plaintiffs were the heirs of the grantor. He denied each and every other allegation of the complaint. By way of a further and separate answer, he alleged that the grantee paid a fair and reasonable consideration for the property and that the deed was delivered to the grantee absolutely and without condition. By way of a further answer he alleged that the action was barred by 33-5-1 and 35-5-3, U.C.A. 1943. By way of further defense he also alleged that the action was barred by 104-2-24, U.C.A. 1943. (TR. 12, 13).

Upon the issues thus drawn the cause was heard by the court sitting without a jury.

At the beginning of the trial the defendant objected to the introduction of any oral testimony for the purpose of imposing the trust on the property for the reason that the plaintiffs had pleaded an express trust and that such is contrary to the statute of frauds. He made the further objection that the plaintiff failed to state a cause of action. The objection was overruled. (TR. 49).

FURTHER STATEMENTS OF FACT

On the 18th day of August, 1927, the grantor, a widow, executed to her daughter Amber Haws as grantee, a warranty deed conveying the property in question. The deed was absolute and unconditional on its face without any reservations whatsoever. The grantor retained possession of it until the 2nd day of August, 1933, when she caused it to be recorded

by Lucinda Haws Ballam, one of the plaintiffs, in the recorder's office, Cache County, Utah. (Exhibit "A" TR. 149, 150).

At the date of the commencement of this action, on the 19th day of March, 1947, both the grantor and grantee were dead, the grantor having died on the 24th of March, 1939, and the grantee on the 16th of March, 1945. The action was also started two years after the grantee's death and just five days short of nine years of the grantor's death, also nearly 20 years after execution of the deed and 14 years after its delivery. (TR. 3-6).

In 1919 the grantee left Utah, making her home in California where she resided until 1937, all the while being gainfully employed and making from 63 cents to $1.25 per hour. She quit her employment and returned to Hyrum, Utah, to take care of her mother who was sick, which she did until her mother's death two years later. (TR. 60-62, 167-168, 197-198, Exhibit "5").

The grantee was the oldest in the family and assisted her mother since she began working in 1917 until the latter's death in 1939. She remained unmarried until her mother's death when she married the defendant April 8, 1939 at the age of 47 years. (TR. 114, 180, 204).

In fact, she not only helped her mother financially over the years but she paid the expenses of her mother's last illness, including her doctor's bill and funeral expenses except the sum of $75.00 which was furnished by the State Welfare Department. On April 5, 1939, she paid $100.00 on account to the Thompson Funeral Home; April 8, 1939, she paid $8.00 for

cement work and the digging of the grave; on May 12, she paid $75.00 furnished by the Welfare Department and $50.00 of her own money. (TR. 161, 167, 168, 171, 199, 201 and Exhibit "6").

That Amber Haws, the grantee, was of financial assistance to her mother and family and had been for over a number of years is further indicated by the fact that she paid the funeral expenses of Noble Haws, a brother, the father of two of the plaintiffs, in 1941. (TR. 202, Exhibit "7").

Mrs. Haws, the grantor, told several people that she was going to and later that she had deeded the property to her daughter, Amber, or as they put it, "gave it to her," because of the grantee's goodness and financial assistance to her.

In accordance with this a nephew, C. H. Lewis, declared, "Well, the only conversation I had with her was that she had given it to Amber because Amber had done so much for her, that she had sent her money when she was in California and had come home and taken care of her and that she had given the property to Amber." (TR. 161, 162).

She also made practically the same statement to a niece, the wife of C. H. Lewis, on more than one occasion. (TR. 167, 168).

A neighbor, Raymond Nielsen, reported, "Yes, she just said that Amber was going to get the place." (TR. 165).

In line with these declarations the grantor deeded the property to the grantee, and the grantee upon her mother's death on March 24, 1939, went into exclusive possession of

the property in question. Upon her marriage to the defendant it became their home and they held it out to the world as such and they lived in it together until her death, March 16, 1945, a period of nearly seven years, paying the taxes. During that period the grantee not only held out to the world and to the plaintiffs herein that the property was hers and the home of her and her husband, the defendant, but in keeping with such declarations she and the defendant improved the property. They straightened out and moved back a corral, leveled the lot north of the house, pulled trees out on the southeast side of the house, planted an orchard of trees on the southeast corner of the lot south of the barn, planted some berries, shingled the shanty, put a roof over the cellar and a cement floor in it, had the inside walls stuccoed, built a building in front of the cellar for an entrance and planted some hay. This was done during the years 1940 and 1941. (TR. 63, 64, 173, 174, 183, 185, 210, 212, 216).

In 1935 the property was conveyed to Cache County, Utah under a tax deed because of failure to pay the taxes assessed thereon. Pursuant to which the grantor wrote the grantee telling her that the property was being sold for taxes and if she didn't send her $100.00 to pay them it would be sold. The grantee sent up $100.00 to pay taxes, upon payment of which Cache County conveyed property back to the grantee by quitclaim deed on the 29th of May, 1936. (TR. 182, 183, Exhibit "2", Entry 16).

The transaction with the county was handled by Garland Haws, one of the plaintiffs, and although he admitted handling the transaction and paying to Cache County the $100.00 he

did not remember from whom it came. He did not deny that it came from Amber Haws, the grantee. (TR. 253).

A few weeks before Amber Haws Jensen's death, she and the defendant made a trip to California where they visited with Mrs. Rose and Mrs. Ballam, two of the plaintiffs, and about the time and the grantee and her husband were leaving California to return to Utah, they asked why she didn't sell her home in Hyrum, Utah, and move to California, buying a home there. (TR. 190, 191).

The defendant and Amber, his wife, the grantee lived on the property from the date of their marriage, April 8, 1939, until her death on March 16, 1945, during which time none of the plaintiffs nor any other person claimed any interest in the property. All of them knew that they were living there and had taken exclusive possession. Mrs. Ballam, one of the plaintiffs, and her husband visited them in 1940 and 1941. (TR. 63, 125, 126, 135, 185).

As noted before, the grantee resided in California from 1919 until 1937 when she returned home to take care of her mother, the grantor, and thus she was a resident of that state at both the time of the execution of the deed and delivery of the deed. The deed was recorded at the instance of the mother, not by the grantee but by one of the plaintiffs. (TR. 112, 113, 150).

Furthermore, there is no evidence that the grantee ever had any knowledge that her mother intended to or had conveyed the property to her until after delivery of the deed, that she ever induced her mother by action or suggestion to deed the

property to her, or that she ever made any promise to her mother whatsoever as a condition to her receiving the property. There is no evidence that she knew or was advised by her mother or anyone else that the property was to be taken subject to any condition whatsoever. (TR. 50, 51, 55, 60, 66, 73, 76, 81, 91, 93, 96, 97, 108, 114, 115, 117, 130, 142, 149, 150, 151, 152, 156, 159, 161, 162, 164, 165, 167, 168, 181, 182, 183, 184, 190, 193, 194).

ASSIGNMENT OF ERROR

1. The Court erred in overruling the defendant's general demurrer to plaintiff's complaint, for by the demurrer the defendant raised the Statute of Fraud and the complaint on its face showed that plaintiffs were declaring on an express and not upon a constructive trust.

2. The Court erred in overruling the defendant's objection to the introduction of any parol evidence for the reason that the plaintiff's complaint showed on its face that they had declared on an express trust and that it was within the Statute of Frauds.

Before the introduction of any parol evidence, the defendant made the following objection:

> "Mr. L .D. Daines: Just a minute. At this time we object to the introduction of any parol testimony for the purpose of attempting to alter this deed or impose a trust on this property, for the reason that the plaintiff in this case has now pleaded an express trust and such other testimony is contrary to the Statute of Frauds. We make further objection on the grounds that they failed to plead a cause of action.

The Court: You may answer. The objection is overruled.

Mr. Daines: If the Court please, may we have a ruling that it goes to all the testimony?
The Court: Yes, the record may show that the objection will go to all the testimony along this line." (Tr. 49).

There was no documentary evidence introduced whatsoever, signed either by the grantor or the grantee which by its terms created a trust.

3. That the Court erred in admitting the following testimony of the plaintiff's witness, A. A. Savage, to which the defendant duly objected.

"By Mr. Bell.

Q. I ask you whether or not you have had any conversation with Maria Haws concerning this property?
A. I did on one occasion.

Q. And when was that occasion?
A. It was in the month of February, 1935 * * *

Q. And where did the conversation take place?
A. In her home.

Q. And who was present at the time?
A. Well, I couldn't tell you whether there was anyone else other than her, I couldn't. I can't remember that.
* * *

Q. Will you give us the nature of that conversation?

Mr. L. D. Daines: We object at this time to any testimony on the grounds that this conversation is after the delivery of the deed.

The Court: You may answer * * *

Q. Continue on with the conversation.
A. I asked her if we should send this—this attached notice sent to Amber, and she says "No, send it here." Says 'I transferred the property to Amber, thought she might gest take care of it in dividing it up when I die." (Tr. 72-73).

The deed was delivered August 2, 1933 (Tr. 4).

4. That the Court erred in admitting the following testimony of the witness Nora Neilsen, to which the defendant duly objected.

By Mr. Young:

Q. Did you discuss or have any conversation with Mrs. Haws during her lifetime with respect to the matter of her property?
A. Yes, sir.

Q. Can you tell us when the last conversation took place that you recall? Could you fix some definite time?
A. Well, I couldn't give you a definite time. But I could give you probably the year * * * It was probably in 1935. * * *

Mr. L. D. Daines: We object at this time on the grounds the evidence shows the conversation was subsequent to the execution of the deed. * * *

Q. What I wanted to inquire about was that last conversation you recall having with her or hearing her talk about her property.
A. Well, that took place at my own home right on the porch. We were sitting on the porch and she told me—.

Q. Just a minute before that. Do you recall when that was?
A. Well, I think it was about 1935 * * *

Q. Allright, now what did she say?
A. Well she says: "Vera," she says, "I am going to fix my property so that Amber will take care of it. And when I pass away I want her to keep the old home for the children that they will have a gathering place to come," and she says, "I know that Amber will do that because she is fair and just." And by the way, at that time she was the only single member of the family." (Tr. 88-91).

This witness has changed her testimony to "She had fixed the deed."

The deed was delivered August 2, 1933 (Tr. 4).

5. That the Court erred in admitting the following testimony of the witness Hermoine Rose, one of the plaintiffs, to which the defendant duly objected:

By Mr. Bell:

Q. I will ask you if you ever had any conversation between Amber and any members of your family regarding this property.
A. Yes, we had—.

Mr. L. D. Daines: Just a minute—.

The Court: Same objection; same ruling."

The defendant objected to the witness's husband, Lawrence Rose, testifying for the reason:

Mr. L. D. Daines. We object on the grounds that it is incompetent for this man to testify under the Dead Men's Statute."

The objection of counsel as the record reflects was to have been the same objection as imposed to the testimony of the husband of the witness to testify.

By Mr. Bell:

Q. Will you state the nature of the conversation that took place at that time?

A. Well, Amber was very sick at the time and my sister Mrs. Ballam, and her husband and my daughter-in-law, Arlene Rose and Mr. Jensen was there and she was crying. It was just a day or two before they had to leave to return to Hyrum or for Utah and she said they hoped to come back, and my sister asked her why she didn't sell the old place. We would give her permission, and there would be—and it would be allright with us. She could sell it and come down there so we could all be together and she said, "No, she would not sell the home." Mother's wish was that it remained the way it was so there would be a home for someone. At that time Mr. Jensen said they did not care to sell, and she told him it was not any of his affair." (Tr. 130, 140-142).

6. The Court erred in admitting the following testimony of the witness, Lucinda H. Ballam, one of the plaintiffs:

By Mr. Young:

Now, Your Honor, this witness, of course, is a daughter of the decedent, Maria, and a sister of the decedent, Amber Haws—and we also offer to prove the conversation between this witness and her sister, the grantee

in the deed, as to the conversation between them. Now I suppose it raises the question as to whether or not the evidence is admissible under the so-called Dead Men's Statute. * * *
The Court: You may put on her testimony subject to their objection.

Q. Now, did you ever have any talk with your sister Amber about the matter?
A. Oh, yes.

Q. When did you talk to her?
A. Well, we talked of it in my home in California; she said that— * * *

Q. What did Amber say?
A. She said the place was her home. We should all feel free to come home any time we wanted to, that it was ours as much as hers, and any of our children would be welcome there. When we got through with it, if she ever sold it, why, the intention was that we should have our share—.

Q. Were you present at the home of your sister, Mrs. Rose, one time when Mr. Jensen and your sister Amber was there?
A. Yes, I was * * *

Q. Allright. Now, what was the substance of that conversation, in Mr. Jensen's presence?
A. Only that Mrs. Rose here—we were all talking here. We were sitting in the front room and Mr. and Mrs. Rose and Mr. Jensen and Amber and I were there, and she was not feeling a bit well and she was crying. She said she hated to go back to Hyrum. "Why don't you sell out and come back here and have a home? We would like to be together." We had been separated so much. She said, "I will never sell the place because mother wanted it for all the children and that's the way it's going to stay." At that time

Mr. Jensen said something about wanting to sell it and she said, "You keep still. This is nothing to do with you. You won't get anything out of it." (Tr. 146-148, 150-152).

7. That the Court erred in finding that prior to and at the time of the execution of the deed, and at the time of recording and delivery thereof, the grantor, Maria Anderson Haws, intended that the grantee thereof, the said Amber Haws Jensen, would take and hold said property as trustee for the use and benefit of the heirs of Maria Anderson Haws. That Amber Haws Jensen paid no consideration whereof for the said property, that the said Amber Haws Jensen accepted said deed in accordance with the terms and provisions of said trust, if any, and thereby agreed to take legal title to said property as trustee for the use and benefit of the said heirs at law of the said Maria Anderson Haws upon her death for the reason:

(a) That it is contrary to the Statute of Frauds and based on parol testimony; and/or that there is no evidence to support the finding; and/or that it is against the weight and perponderance of the testimony; and/or that the plaintiff failed to prove that the deed was delivered to the grantee unconditionally and without reservations by evidence which clearly, definitely, unequivocably and conclusively proved that the deed in question was taken conditionally and subject to a trust, if any.

(b) That said finding is indefinite in that it cannot be ascertained therefrom, together with other findings in the record, what were the terms of the trust, if any. That there are no facts found therein which would establish a trust.

8. That the Court erred in finding that the conveyance of the property to the grantee while in the form of a Warranty Deed was a trust, and that the grantor executed said deed for the purpose of avoiding probate proceedings and that Maria Anderson Haws intended to create a trust for the heirs while living and after her death for the use and benefit of the heirs at law of Maria Anderson Haws, for the reason that it is within the Statute of Frauds based on parol testimony; and/or that there is no evidence to sustain the finding; and/or that it is contrary to the weight and preponderance of the testimony; and/or that it is not based upon clear, definite, unequivocable and conclusive proof; and/or that it is so indefinite that it cannot be ascertained what were the elements of trust, if any.

9. That the Court erred in finding that John P. Jensen, the defendant, received legal title to the property as trustee, subject to the terms of the trust, if any, created by Maria Anderson Haws, for the reason that it is within the Statute of Frauds based on parol testimony; and/or that it is contrary to the weight and preponderance of the testimony; and/or that such trust, if any, was not established by clear, definite, unequivocable and conclusive proof.

10. That the Court erred in finding that the defendant as a fraud upon the plaintiffs in full knowledge of the acceptance of the trust, if any, refused to recognize the validity of the trust, if any, and claimed said property by right of succession, free and clear of said trust, if any, and equities of said trust, if any, for the reason that it is within the Statute of Frauds based on parol testimony; and/or that there is no evidence to

sustain the finding; and/or that it is contrary to the weight and preponderance of the testimony; and/or that it is not based upon clear, definite and unequivocable and conclusive proof.

11. That the Court erred in making and entering its Conclusions of Law that Amber Haws Jensen took the property in trust and not as an absolute conveyance, and that at the time of her death she held said property in trust for the use and benefit of the heirs at law of Maria Anderson Haws, and that the beneficial title to the property is vested in the heirs at law of Maria Anderson Haws, and that the plaintiffs are entitled to have a trustee appointed to succeed said Amber Haws Jensen and the said John P. Jensen as trustee of said property, and that the said John P. Jensen should convey his legal title to said successor trustees, for the reason that the findings of fact do not support the conclusion of law and/or there is no evidence to sustain the findings; and/or that the findings are against the weight and preponderance of the testimony; and/or that the plaintiffs failed to establish by clear, definite, unequivocable and conclusive proof any trust whatsoever; and/or that such trust, if any, was within the Statute of Frauds; and/or that the said findings are indefinite and ambiguous in that they have failed to describe the terms of the said trust, if any; and/or that if the terms of said trust, if any, are definitely established, that the said John P. Jensen is the sole heir at law of Maria Anderson Haws and is entitled to one-sixth interest in said property.

12. That the Court erred in entering its order and decree wherein it ordered and adjudged that Amber Haws Jensen

held the property in question in trust until her death on March 16, 1945, for the use and benefit of the heirs at law of Maria Anderson Haws, and that John P. Jensen received legal title to said property as said trustee, subject to the terms of the trust, if any, created by Maria Anderson Haws, and that the defendant John P. Jensen as a fraud upon the plaintiffs in full knowledge of the acceptance of said trust, if any, now refuses to recognize the validity of the trust, if any, and claims that said property by the right of succession free and clear of said trust, and all of the equities therein, and that it is necessary that a successor trustee to the defendant be appointed, and in appointing Vera Haws as trustee of the property in question, for the use and benefit of the heirs of Maria Anderson Haws and in ordering that the defendant quit claim of all of his right, title and interest in said property to the trustee, for the reason that the findings of fact and conclusions do not sustain the decree that there is no evidence to sustain the findings; and/or that the findings are against the weight and preponderance of the testimony; and/or that the plaintiffs failed to establish by clear, definite, unequivocable and conclusive proof any trust whatsover; and/or that such trust, if any, was within the Statute of Frauds; and/or that the said findings are indefinite and ambiguous in that they have failed to describe the terms of the said trust, if any; and/or that if the terms of said trust, if any, are definitely established and supported by the evidence that the said John J. Jensen is the sole heir at law of Amber Haws Jensen and is entitled to a one-sixth interest in said property.

13. That the Court erred in failing to find that the property was deeded to the grantee by the grantor unconditionally and without any reservations whatsoever and in failing to enter its judgment and decree in favor of the defendant and against the plaintiff, decreeing that the defendant received the property in question free and clear of all claims and demands of the plaintiffs, for the reason that the grantee received the conveyance unconditionally and not subject to any trust; and/or that if there is any trust it is within the Statute of Frauds; and/or that there is no evidence to establish that the deed was conveyed conditionally and subject to a trust; and/or that no trust was established by the weight and preponderance of the testimony; and/or that no trust was established by clear, definite, unequivocable and conclusive proof.

14. If there was a trust the court, nevertheless, erred in failing to find the defendant, as the sole heir at law of Amber Haws Jensen, the grantee, was entitled to a one-sixth interest in the property in question.

15. That the Court erred in failing to find that plaintiffs' cause of action, if any, was barred by sub-paragraph 3 of 104-2-24, U.C.A. 1943,—the Statute of Limitations, for the reason that if a trust, if any, was established, it was repudiated by the grantee more than three years preceding the commencement of this action, and that the plaintiffs had notice of such repudiation.

16. That the Court erred in failing to find that plaintiffs' cause of action, if any, was within the Statute of Frauds, and

unenforceable, for the reason that if a trust, if any, it was established by parol evidence and that the plaintiffs were declaring upon an express trust.

ARGUMENT

It is the contention of the defendant that the court's decree imposing a constructive trust is contrary to the law and evidence for the following reasons:

1. That the court erred in overruling defendant's general demurrer to plaintiffs' complaint for the demurrer raised the question of the Statute of Frauds and plaintiffs' complaint on its face showed that they were declaring on an express oral trust and not upon a constructive trust, and that the plaintiffs' cause of action was within the Statute of Frauds.

2. That the court erred in overruling defendant's objection to the introduction of any parol evidence for the reason that plaintiffs' complaint on its face showing that they were declaring on an express trust and that it was within the Statute of Frauds.

3. That the court erred in admitting plaintiffs' witnesses to testify as to self-serving declarations of the grantor not in the presence of the grantee and made after the delivery of the deed in disparagement of the title conveyed.

4. That the court erred in permitting two of the plaintiffs to testify over defendant's objection as to conversation with the deceased grantee regarding the transaction in dispute.

5. That there is no evidence to sustain the court's findings of fact that the grantee took the property subject to any conditions for the use and benefit of the grantor's heirs, and that in any event the conveyance is within the Statute of Frauds and void.

6. It is defendant's further position that the plaintiffs failed to prove by preponderance of the evidence and by clear, certain, definite, unequivocal and conclusive proof that the grantee took the deed subject to any conditions whatsoever.

7. That in the event there was a trust created the court, nevertheless, erred in directing the defendant to convey all of his right, title and interest in the property to a trustee for the reason that as sole heir of the grantee he was entitled to whatever interest she had in the property, or one-six interest.

8. That in any event the plaintiffs' cause of action if any is barred by the Statute of Limitations, sub-section 3, 104-2-24 U.C.A. 1943 for the reason that if a trust existed it was repudiated by grantee more than three years prior to the commencement of this action.

THE COURT ERRED IN OVERRULING DEFENDANT'S GENERAL DEMURRER TO PLAINTIFFS' COMPLAINT AS THE COMPLAINT ON ITS FACE SHOWED THAT PLAINTIFFS HAD DECLARED ON AN EXPRESS ORAL TRUST AND THAT IT WAS WITHIN THE STATUTE OF FRAUDS.

To plaintiffs' complaint defendant filed a general demurrer, alleging that it did not state a cause of action, and that it was barred by 33-1-5 U.C.A. and other section applicable thereto statute of frauds. The demurrer was argued and overruled. (TR. 7, 35). At the beginning of the trial the defendant further objected to the introduction of any oral testimony stating the reason that plaintiff had pleaded an express trust, that such was contrary to the Statute of frauds, and that the plaintiffs had failed to state a cause of action. The objection was overruled. (TR. 49).

The complaint recited that they were declaring on an *oral* trust, stating, "That the conveyance of said property to the said Amber Haws Jensen while in the form of a warranty deed was intended to create an *oral trust*" (TR. 4) and having pleaded an express oral trust they failed to set forth any facts whatsoever that would take it out of the statute of frauds. No constructive trust was alleged. There are no allegations of confidential relationship, fraud, misrepresentation, or any other matter that would establish a constructive trust. (TR. 3, 6).

The statute of frauds may be raised by demurrer, where it appears on the face of the complaint, that the plaintiff is declaring or an express oral trust.

The Supreme Court of California in the case of Barr v. O'Donnell 18 P. 429 said:

> "If land be conveyed by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold the property

> in trust or convey it. * * * And if it appears on the face of the complaint that the alleged trust rests in a parol agreement to reconvey, the defense of statute of frauds may be taken advantage of on demurrer."

To the same effect see: Mick v. Butler 256 P. 159; Moynihan v. Murphy 148 N. E. 380; Oglesby v. Wilmerding, Morris & Mitchell 99 S. E. 29; Wright v. Young 176 P 583; Howard v. Foskett 189 P. 396; Bogert, Trusts and Trustees Vol. 1. Sec. 71. 280.

And Bogert, in his work on Trusts and Trustees, Vol. 1 Sec. 70 p. 276 sets forth that either the trustee or his successor in interest or title can take advantage of the Statute of Frauds. He said:

> The seventh section of frauds was enacted to prevent trust obligations being fastened upon parties through parol testimony which is subject to the danger of fraud, perjury and mistake. It would seem, therefore, that only those who will escape obligations and duties by means of setting up the statute should be allowed to take this advantage. The trustee obviously comes under onerous duties by means of a trust. He of all persons ought to be allowed the protection of the statute, so that his title to realty, which appears on the face of it to be absolute, shall not be encumbered and burdened by a doubtful trust, and he himself shall not lightly be placed in a fiduciary position requiring extreme good faith and much diligence. The trustee and his successors in title to the trust property by way of intestacy, transfer by will, or transfer inter-vivos, are allowed to plead the statute of frauds and defeat the enforcement of the oral trust."

The court had befort it 33-5-1 U.C.A., 1943, which reads:

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

Also sec. 33-5-3 U.C.A. 1943 which reads as follows:

> Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

As previously pointed out, the plaintiffs are declaring on an express oral trust, and they pleaded no facts that would take the oral trust out of the statute of frauds. A constructive trust was not alleged. They did not allege any fraud, misrepresentation, breach of a confidential relationship, or any other elements necessary to create a constructive trust.

The Supreme Court of Kansas, in the case of Mick v. Butler, 158 P. 256, supra, held that defendant's demurrer to plaintiff's complaint was good for the reason that the complaint on its face showed that it was an express oral trust and within the statute of fraud. The plaintiff alleged that both she and the defendant were members of the same church, of which the defendant was a leading member, that she orally agreed with him that she would turn over to him a certain

lot for the benefit of the church on the condition that if the building ceased to be used for church purposes that it would revert to her. That the defendant orally accepted the trust and with it the sales contract which she had of the property and that on June, 1921, she gave the defendant seventy-five dollars with which to make final payment on the property; that he converted the property to his own use. In sustaining the general demurrer, the court said:

> " * * * The pleading sets up an express trust created by oral contract. The fiduciary relations arise by reason of this express oral contract, and the fiduciary character of the transaction is alleged to have been created by the very contract upon which the cause of action is based. It is not a case of fiduciary relations already existing and a trust created by law or a resulting trust. It sets up an express trust created by oral contract, and this is squarely interdicted by our statute. Therefore the court believes that the statement of such a trust is not the statement of a legal obligation, and that therefore the demurrer is well taken on that ground."

In the Massachusetts case of Moynihan v. Murphy 148 N. E. 380, supra, the plaintiff alleged that the grantor conveyed property to her daughter, the grantee, upon her agreement to hold it for herself and sisters, keep it in repair, pay the liens thereon, and provide a home for the mother during her lifetime. That the plaintiff remained in possession after the grantee's marriage to the defendant, supported the mother, and paid the taxes thereon. The husband of the deceased grantee and administrator of her estate raised the statute of fraud by demurrer. The Court, sustaining the demurrer, said:

> "No trust can be created by oral statements or agree-

> ments by either Margaret or Annie T. Moynihan * * * Nor do the facts alleged support a constructive trust. No fraud was practiced on Margaret Moynihan. Annie T. Moynihan made no representation and no promises to any of the plaintiffs so far as the bill shows."

In the Georgia case of Oglesby v. Wilmerding, Morris & Mitchell 99 S. E. 29 plaintiffs alleged that George B. Lumpkin, father of T. B. Lumpkin, died, leaving a widow, four children and tract of land. They sold the land, paid the debts, and has $4000 remaining. They agreed that the $4000 should be held in trust by T. B. Lumpkin, charged with the duty of paying to Mrs. Lucy A. Lumpkin, the interest on the same at 8% during her lifetime, and on her death, the $4000 was to be divided equally among the four children; that T. B. Lumpkin did take the $4000 under these terms and conditions, and paid Mrs. Lucy A. Lumpkin the interest on the same up to the time of her death which occurred March 21, 1909 and paid certain small sums to petitioner, reducing her debt to $963. The Court said:

> "We are of the opinion that the Court properly sustained the general demurrer to that part of the petition which seeks to have the debt due the petitioner given a priority as a trust. If the verbal agreement under which T. B. Lumpkin took charge of the fund of $4000 created a trust, it was an express trust, and under the provisions of our law, all express trusts must be created in WRITING."

In the Oregon case of Howard V. Foskett, 189 P. 396, the plaintiffs alleged that the defendant's husband conveyed the property to her upon her verbal agreement that if she

survived him that she would convey the property to the plaintiffs reserving in herself a life estate that in reliance of said verbal promises to said Alice S. Foskett and believing same to be true and in consideration thereof her husband consented to the execution of the deeds. That the Court said:

> "The rule is universal that a parol declaration of a trust will not affect the land, and for this reason parol evidence is inadmissible to establish such a trust. In Fairchild vs. Rasdall, 9 Wis. 379, the court, speaking of the universality of this rule, say: 'We do not feel called upon to cite authorities to show that, in the absence of fraud, accident, or mistake, parol evidence cannot be received to prove that a deed, absolute on its face, was given in trust for the benefit of the grantor.' "

In the Arizona case of Wright v. Young 176 P. 584, the plaintiffs alleged that the mother of plaintiffs and of Mary S. Wright died March 31, 1908, intestate, seized of certain lands; that the plaintiffs and Mary S. Wright were and now are the sole heirs of their mother; that Mary S. Wright married the defendant on November 20, 1911; that on April 18, 1908, they deeded their interest in the property to Mary S. Wright, it being mutually agreed that she would accept, take and hold the title to the property for the purpose of making a sale; that she could occupy, keep in repair, and pay the taxes on the property, and that as soon as the premises were sold, the proceeds were to be divided among the plaintiffs; that she died April 4, 1915, and *her husband, the defendant,* refuses to carry out the terms of the agreement. The husband raised the statute of frauds by demurrer. The Court said:

"There are decisions to the contrary, but we think the better rule is that where the deed is absolute upon its face, as in the instant case, and where the pleadings and the evidence both show an express trust, and where there is no allegation of facts in the complaint showing fraud, duress, or undue influence, the grantor ought not to be allowed by parol evidence to ingraft upon his own deed a trust in his own favor as against the terms of his own deed. The stability of titles rests largely upon written instruments, and to protect titles this rule in reason ought to prevail.

" * * * The pleadings in plaintiffs' amended complaint contain no allegations of fact showing fraud, misrepresentations, concealments, undue influence, duress, or that any undue advantage was taken of the plaintiffs by reason of weakness or necessities which would render the taking of the property by the said Mary S. Wright unconscientious. The pleadings wholly fail to show a constructive trust; but, on the contrary, they show an express trust, and the evidence establishes an express trust. When the pleadings and the evidence both show an express trust, the grantor in a deed duly executed and delivered cannot impress or ingraft by parol a trust in his favor against the terms of his own deed."

The decisions of this Court, we believe are in line with the foregoing authorities. For in the case of Chadwick v. Arnold, 34 Utah 48, 95P. 527, in an opinion by Justice Straup, laid down the rule that a constructive trust only arises by means of an intentional false or fraudulent verbal promise to hold property for a certain purpose. The Court quoted Sec. 1056 3 Pom. Eq. Jur. (3rd edition) as follows:

"The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise

> to purchase and convey land. In order that the doctrin of trusts ex maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts."

And we do not find any subsequent case which varies the rule. The case of Jeppson v. Erdmann, 209 P. 203, does not, as the decision is only authority for the proposition that the mere wish by the grantor that the grantee would make certain disposition of the property, did not establish a constructive trust. Furthermore, it does not appear that the case of Hansen v. Hansen, 171 P. 2, 392 varies the rule announced in the case of Chadwick v. Arnold, supra, as it appears to be only authority for the rule that the mere expression of an intention to create a trust, and the contemplation that something more is to be done, such does not create a trust! It would thus seem that these cases are further authority for the proposition that the plaintiffs did not state a cause of action, for there is no allegation whatsover that the grantee made any intentional fraudulent promise or any other promise to the grantor as a condition for the conveyance.

It is true that an early Utah case of Haite v. Pearson, 39 P. 497 held that a mere breach of promise would raise a

constructive trust. However, we find no fault with this and Chadwick v. Arnold, supra, did not depart from it, as in that case there existed a confidential relationship of attorney and client, and it was this relationship that layed the foundation for the rule that breach of promise was sufficient fraud to raise a constructive trust.

In this respect it should again be noted that plaintiff did not allege in any manner, whatsoever, that the grantee secured conveyance of the property upon an intentional false promise. In fact, there is no allegation that grantee made any promise to grantor as a condition to the conveyance of the property to her. There is no allegation of fact showing a confidential relationship.

That the foregoing is the better rule and is the weight of authority in this country see Bogert on Trusts and Trustees, Vol 3, Section 495 and 496.

THE COURT ERRED IN ADMITTING THE INTRODUCTION OF ANY PAROL TESTIMONY AS THE PLAINTIFFS' CAUSE OF ACTION IS BASED ON AN ALLEGED *ORAL* TRUST.

It is the defendant's 2nd contention, Assignment of Error No. 2, that the court erred in admitting over defendant's objection and in the face of his affirmative defense of the statute of frauds any parol testimony tending to establish an express oral trust, as the complaint on its face as previously argued under Assignment of Error No. 1 alleged an express

oral trust and failed to allege any facts whatsoever establishing a constructive trust.

The only evidence regarding the circumstances surrounding the creation of the conveyance and the delivery of the deed were oral. No instruments in writing were offered or received, signed by either grantor or grantee tending in any degree to create a trust.

The court had before it for consideration 33-5-1 and 33-5-3 U. C. A. 1943, supra, for consideration.

The rule applicable here is set forth in JONES ON EVIDENCE—CIVIL CASES, FOURTH EDITION, Vol. 2, § 418, page 789, as follows:

> "By the seventh and eighth sections of the English statute of frauds, it is provided that declarations or creations of trusts or confidences in lands shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; otherwise they shall be void. The exception is made, however, as to trusts or confidences resulting by the implication or construction of law. In substance at least this provision has been carried into the statutes of many of the states. Where this is the case, the statute operates to prevent the enforcement of an express trust which purports to have been created in respect of real property by parol."

Thus there is no competent evidence to sustain plaintiff's cause of action, and all of plaintiff's testimony should have been excluded.

THE COURT ERRED IN ADMITTING OVER DEFENDANT'S OBJECTION PLAINTIFFS' WITNESSES TO TESTIFY AS TO SELF-SERVING DECLARATIONS OF THE GRANTOR AFTER THE EXECUTION AND DELIVERY OF THE DEED.

The 3rd contention we wish to urge for the court's consideration is presented by defendant's assignment of error 3 and 4. It is this that the court erred in permitting plaintiffs' witnesses, A. A. Savage and Nora Nielsen to testify regarding purported statements of the grantor in disparagement of the title conveyed since the self-serving declarations were made after the execution and delivery of the deed and were inadmissible. The deed was delivered December 2, 1933, and the purported declarations were supposed to have been made in 1935.

The witness, A. A. Savage testified:

> A. "And I asked her if we should send this—have a tax notice sent to Amber and she said, 'No, send it here,' says, 'I transferred the property to Amber, thought she might best take care of it—divide it up when I died.' " (TR. 73).

The witness, Nora Nielsen, testified:

> A. Well, she says: "Vera," she says, "I am going to fix my property so that Amber will take care of it. And when I pass away I want her to keep the old home for the children that they will have a gathering place to come," and she says, "I know that Amber will do that because she is fair and just." And by the way, at that time she was the only single member of the family."

Admission of this evidence was in error for a grantor cannot, after she has conveyed title to the property, make statements in disparagement of the title. The editor of AMERICAN LAW REPORTS, 156 A.L.R. 1335 in an annotation sets forth the rule as follows:

> "It is a well-established rule of evidence that the declarations of a person under whom title is claimed are receivable against the successor so claiming, on the theory that there is sufficient identity of interest to render the statements of the former equally receivable with the admissions of the present owner, and that the rights of the latter are those and only those, of the former.
>
> There is, however, a limitation to this rule as regards the time when the declaration is made. Declarations of the grantor made after he has conveyed his interest in the property cannot, as a rule, be admitted in evidence against his successor as an admission binding on the latter. After the grantor has executed and delivered a deed absolute on its face, his declarations reflecting on the title of his successor are, as far as the rules of evidence are concerned, in no way different from declarations made by third persons, and, hence, are not admissible against the grantee."

TRIAL COURT ERRED IN PERMITTING PLAINTIFFS, HERMOINE ROSE AND LUCINDA BALLAM, TO TESTIFY OVER DEFENDANT'S OBJECTION AS TO CONVERSATIONS REGARDING THE TRANSACTION IN DISPUTE WITH THE DECEASED GRANTEE.

The defendant's 4th contention is that the court erred, Assignments of Error 5 and 6, in permitting over defendant's objection, Hermoine Rose and Lucinda Ballam, both plaintiffs, to testify to conversations purported to have taken place between them and the deceased grantee regarding the transaction in dispute. The declared conversations were equally within the knowledge of the witnesses and the deceased grantee. The defendant's title vested in him as an heir of the grantee it was distributed to him in probate. He did not claim it in his own right but as an heir of the grantee. In this action is thus an attempt to assail and reduce the estate from which the defendant derived his title to the property in question. The basis of the defendant's title is the integrity of the grantee's estate from which it was derived. Thus these witnesses were incompetent to testify. Hermoine Rose's testimony regarding their purported conversations was as follows:

> A. "Well, Amber was very sick at the time and my sister, Mrs. Ballam and her husband and my daughter-in-law, Arlene Rose, and Mr. Jensen was there and she was crying. It was just a day or two before they had to leave to return to Hyrum or for Utah and she said they hoped to come back, and my sister asked her why she didn't sell the old place. We would give her our permission, and there would be—and it would be all-right with us. She could sell it and come down there so we could all be together and she said, "No, she would not sell the home." Mother's wish was that it was so that there would be a home there for someone. At that time Mr. Jensen said they did not care to sell, and she told him it was not any of his affair." (Tr. 130, 240-142).

Lucinda H. Ballam's testimony regarding their purported conversation was as follows:

> A. She said the place was her home. We should all feel free to come home any time we wanted to, that it was ours as much as hers, and any of our children would be welcome there. When we got through with it, if she ever sold it, why, the intention was that we should have our share—.

And Mrs. Ballam again said:

> A. Only that Mrs. Rose here—we were all talking here. We were sitting in the front room and Mr. and Mrs. Rose and Mr. Jensen and Amber and I were there, and she was not feeling a bit well and she was crying. She said she hated to go back to Hyrum. "Why don't you sell out and come back here and have a home. We would like to be together." We had been separated so much. She said, "I will never sell the place because mother wanted it for all the children and that's the way it's going to stay." At that time Mr. Jensen said something about wanting to sell it and she said, "You keep still. This is nothing to do with you. You won't get anything out of it."

The court has before it sub-paragraph (3) 104-49-2 U.C.A. 1943, which reads as follows:

> (3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or

> grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding.

The Supreme Court of Nebraska in the case of Johnson v. Omaha Loan and Building Ass'n. 257 N. W. 370 held that where a party is called upon to defend what he obtained from a deceased person by inheritance he represents the deceased person within the statute regarding competency of witnesses and that the plaintiff in such action cannot testify. The court said:

> Section 20-1202, Comp. St. 1929, reads as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." The situations in which this statute applies and wherein a litigant or witness may be said to be "the representative of a deceased person," as contemplated by this statute, have been the subject of much controversy, but are quite well settled by the decisions of this court. It is not necessary that the personale rpresentative of the deceased in the sense of being the administrator or executor of the estate be a party. The rule is stated in McCoy v. Conrad, 64 Neb. 150, 89 N.W. 665, 667, and cited with approval in McEntarffer v. Payne, 107 Neb. 168, 185 N.W. 329, in this language: "If a party is so placed in a litigation that he is called upon to

> defend that which he has obtained from a deceased person, and make the defense which the deceased might have made if living * * * then he may be said, in that litigation, to represent a deceased person." These principles apply to the present case and we conclude that the evidence of the plaintiff in regard to the purported delivery of the passbook was inadmissible.

It would thus appear that the court committed prejudicial error in admitting in evidence this testimony.

THERE IS NO EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT THE GRANTEE TOOK THE PROPERTY FOR THE USE AND BENEFIT OF THE GRANTOR'S HEIRS, AND IN ANY EVENT, IT IS A TRANSACTION WITHIN THE STATUTE OF FRAUDS AND VOID.

It is the defendant's fifth contention, (Assignment of Erros Nos. 7, 8, 9, 10, 11, 12, 13 and 16) that there is no evidence to sustain the Court's findings of fact, conclusions of law and decree, to the effect that the grantee took the deed subject to any conditions, with an agreement to hold for the benefit of the plaintiffs and that the conveyance was for the purpose of avoiding probate.

Although it is true that some of plaintiff's witnesses testified that the grantor prior to the delivery of the deed on the 2nd day of August, 1933, (Tr. 149 and 150) told them that she had, or was going to, deed the property to the grantee, so that her daughter on her death could divide it among her heirs, not witnesses testified that she said that the grantee had promised or agreed to do so.

At the time of the execution of the deed in 1927 the grantee was living in Los Angeles, California, and had been for eight years, and at the date of its delivery six years later, she was still living there. The deed was delivered at the instance of the grantor, she having it recorded. One of the plaintiffs, Lucinda Ballam, at her mother's request, placed the deed in the Recorder's Office, Cache County, Utah, for recording, and her testimony regarding this transaction is as follows:

Q. Where was Amber at the time?
A. In California.

Q. How long had she been there?
A. She had been living in California about seventeen or eighteen years.

Q. And who was it handed you this deed?
A. My mother. She came out and said, "Lucinda, I'd like you to take this over and have it recorded."

Q. Did you do that?
A. Yes. * * * Yes, that was in 1933.

Q. Then did you have any talks with your mother at that time about this deed?
A. Yes, she said the day she was having it recorded in Amber's name, as she had said before, she did not want us to have our feelings hurt because she wanted to be fair with all of us, and she said the home would always be there for us if any of us wanted to come back, that we were welcome and that after her death it should be divided equally among all of us, and she was not leaving it for Amber. It was for all the family. (Tr. 149-150)

Mrs. Ballam's husband said he was present at the time and testified as follows:

> A. Yes, she said she had them fix it in Amber's name because she was single. All the rest of the family were married and she felt certain that Amber would keep the property there for a place for any of the children to use if they wanted to come home for any reason, and if it was decided that the property should be disposed of after her death that she knew that Amber would make a fair distribution to all the children. (Tr. 114)

In this respect there is some confusion in the record whether this conversation took place in 1929 or 1933. However, it probably took place in 1933.

This is the only evidence in the record concerning the statement made by the grantor at the time of the delivery of the deed, and if it establishes anything, it is this, that the grantee did not induce her mother to convey the property to her, not did she make any agreement or give a promise as a condition to the conveyance. Her mother did not say that Amber had so promised. It negatives any such proposition.

Mrs. Ballam testified as to purported statements made by the grantor in the year 1927 and the foregoing statement of her husband, W. P. Ballam was either made in 1929 or 1927. Yet in neither of these conversations did witnesses testify that the grantor said that Amber had agreed or promised to hold the property for the grantee's benefit. They were statements of a wish only. (Tr. 114-116 and 149.)

Three other of plaintiffs' witnesses also testified regarding statements made by the grantor prior to the delivery of the deed. They positively said in the years 1925 or 1926, 1927, 1930 and 1932. Plaintiffs' witnesses were always positive of the date, no matter how many years had gone by. An analysis of these witnesses' testimony will also reveal that the grantor never told them that Amber had induced her mother, by promise or otherwise, to convey the property to her, or that she would make any disposition of the property as a condition of its conveyance. (Tr. 51, 71, 91, and 92)

The record is silent as to any purported statement made by the grantee regarding the conveyance until 1934, and both grantor and grantee were supposed to be present when, according to the witness, W. P. Ballam, she made the following statement:

> A. Well, the discussion was to the effect that the property had been left and recorded in Amber's name here, and that Ma (meaning Mrs. Haws) has been left—wanted the property to be left there in case any of the children ever would want to come back and use the place for vacation quarters or for a home.
>
> Q. And what did Amber say?
> A. She said, "Well, that's the way it's going to be left." (Tr. 115)

Now, certainly, these conversations do not create a trust for they are nothing more than an expression of a wish, a wish as to an indefinite something, and a wish, no matter how

definite, does not create a trust. It is said here that Amber was to hold for the plaintiffs for their benefit for distribution upon her mother's death. Jensen vs. Howell, 282 P. 1034, 95 Utah 64; Jeppson vs. Erdmann, 209 P. 203, 60 Utah 543.

Furthermore, this statement negatives any promise or agreement made by the grantee prior to the delivery of the deed that conditions were imposed. This statement, taken at its face value, does not relate to any prior understanding or agreement. It negatives any such proposition and certainly it is the law that a promise made after the acquisition of title does not create a trust. 65 C. J., page 457, says:

> FRAUD AT INCEPTION OF TITLE. In order that fraud may give rise to a constructive trust, it must exist at the inception of title to the property, or inhere in the transaction by which the trustee acquires the title, and fraudulent acts or omissions subsequent to the acquisition of title and not connected therewith do not give rise to a constructive trust. So a constructive trust ordinarily cannot grow out of the mere violation of a declaration or agreement of trust, whether implied or express, written or verbal, nor from a violation of or refusal to perform a promise to or agreement with the person seeking to establish the trust to convey property to him, nor from mere failure to pay the purchase money, for property conveyed, although where the circumstances are such that a constructive trust would arise in the absence of any agreement, the existence of such an agreement will not prevent a trust arising. Likewise, a denial that any trust exists, or a resort to the Statute of Frauds to defeat the enforcement of a parol trust or obligation, is not such a fraud as to give rise to a constructive trust.

As to the other subsequent statements of either the grantor or the grantee, none of them in any way should be construed as establishing an agreement at the time the conveyance was made. At the most they merely indicate the promise to carry out the mother's indefinite wish and this a promise made subsequent to the conveyance. (Tr. 51, 52, 67, 80, 81, 117, 130, 131, 142, 151, 152, 156)

Again in this respect we are setting out two conversations purported to have taken place after the conveyance. In one instance, both the grantor and grantee were present, and in the other, the grantee was to have made a statement after the grantor's death.

Mrs. Laura Garner testified that some time between 1937 and 1939 she was present at a conversation in which the grantor and grantee took part.

> A. Well, we were talking about what Amber was going to do with the home after they knew her mother could not live. And she said, "I have not decided whether to sell it and divide it or to go back to California and live there for some time, for a while. (Tr. 66 and 67)

This conversation indicates definitely that the property was conveyed to the grantee as her own to do with as she wished. Her mother imposed no conditions, made no request and took no exception to what she said. This negatives a trust. In line with this conversation, shortly after her mother's death, while in California she was supposed to have made, according to the witness W. P. Ballam, the following statement:

A. I heard her mention several times any time we wanted to come home and spend a little time or vacation, or for any other emergency, we wanted to move in there, she said, "There is always room for any of us and all of us." She said, "That's the way Ma wanted it to be left and that's the way I intend to have it." (Tr. 117)

These testimonies from plaintiffs' witnesses unquestionably establish that it was given to the grantee without any strings attached and that she was merely intended to follow out her mother's wish that her brothers and sisters would always be welcome in the home.

Now then, where is there any fraud in this case? Even assuming that there was a promise, there is no evidence of an intentionally false or fraudulent one. There is no fraud in the inception of this conveyance.

In any event, plaintiffs' cause of action, both their pleadings and evidence, are within the Statute of Frauds and the transaction was void. To hold otherwise would virtually abrogate the statute, for, as this Court said in Chadwick v. Arnold, 95 P. 527, 34 Utah 48, supra:

> " * * * The foregoing case should be clearly distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts ex maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocable, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated."

THE PLAINTIFFS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE AND BY CLEAR, CERTAIN, DEFINITE, UNEQUIVOCAL AND CONCLUSIVE EVIDENCE THAT THE GRANTEE TOOK THE DEED SUBJECT TO CONDITIONS.

It is defendant's sixth contention, Assignments of Errors Nos. 7, 8, 9, 10, 11, 12 and 13, that plaintiffs' proof falls short even assuming that their cause of action and evidence is not within the Statute of Frauds to establish a constructive trust.

Regarding the quantum of proof necessary to establish a constructive trust this court in the case of Hansen v. Hansen, 171 P. 2nd 382, in an opinion by Justice McDonough, said:

> In all such cases the court will scrutinize parol evidence with great caution, and the plaintiff must fail unless it is clear, definite, unequivocal, and conclusive. Public policy, and the safety and security of titles to real estate, demand this rule, because such evidence is offered to overcome the strong presumption, arising from the terms and conditions of an instrument in writing, which is always the best evidence of title. If it were once established that the effect of the terms of a written instrument could be avoided by a bare preponderance of parol evidence, the gates to perjury would soon be wide open, and no person could longer rest in the security of his title to property, however solemn might be the instrument on which it was founded. * * * To make such an effort successful, the law, for the safety of titles, requires that the proof shall be of the most convincing and satisfactory kind. Nothing short of certain, definite, reliable, and convincing proof will justify the court of divesting one man of title to lands, evidenced by a regular deed,

and putting it in another.' Midmer v. Midner's Ex'rs, 26 N. J. Eq. 299.

As previously pointed out this action was brought 20 years after the deed was executed, 14 years after its delivery, 9 years after the grantor's death and 2 years after grantee's death.

There is a direct conflict in the evidence as to what the intent of the grantor was in conveying the property to the grantee. In this respect even the plaintiffs' witnesses asserted two different theories. The first theory being that the grantor conveyed the property for the purpose of avoiding probate and that the grantee was to distribute the property to the grantor's heirs on her death, and the other theory was, and this was the one pleaded, that she deeded the property so that the grantee would keep it as a family home for the grantor's children.

Defendant's evidence, and this was consistent with the use to which the property was put, was to the effect that it was deeded to the grantee as her sole and separate property, not subject to any conditions whatsoever. The grantee was the oldest in a family of six. She was unmarried at the time of conveyance, she was 39 years of age and had worked all of her adult life, helping her mother and family financially over the years, and when her mother became so ill that she needed care in 1937 the grantee quit her employment in California and returned to Utah to take care of her mother.

In line with the grantee's help over the years, Mr. Conway Lewis, a nephew, said the grantor asserted that she had given

the property to her daughter, Amber, because of her help and financial assistance over the years. In regard to this, he testified:

Q. Did you ever have any conversation with Mrs Haws (that's Maria Haws) with respect to that property?

A. Well the only conversation I had with her was that she had given it to Amber because Amber had done so much for her, that she had sent her money when she was in California and had come home and taken care of her and that she had given the property to Amber * * * .

A. Well that would be hard for me to say exactly what — when it was because — that's all I know she told me she had given the home to Amber and it was the understanding that it was hers. (Tr. 161, 162)

This conversation was after Amber had returned home to take care of her mother.

Mrs. Joyce Lewis, the wife of Conway Lewis, also testified:

A. At one time we were just joking and we were talking about deeds and different people leaving their estates. She just said to me she just hoped things would be fixed up the way she would like them to be.

Q. How did she say they were?

A. She said she thought Amber, her daughter, really should have the place because she had been so good to her. She said she had given her clothes and sent her money to come home and taken care of her when she was sick and she said, "She's been one of the very best girls I've known in my life."

Q. How long was that before she died?
A. Five or six years. (Tr. 167, 168)

And Mr. Raymond Nielsen, who lived in Hyrum and was a friend of the family, said:

Q. * * * did Mrs. Haws ever talk to you in any way about her property?
A. Yes, she just said that Amber was going to get the place * * * .
A. Well it was before Amber came up to live. I don't know just what year it was. (Tr. 165)

Mrs. Beda Petersen, a neighbor of Mrs. Haws and the grantee testified that after her marriage that Amber told her that, "Well, she stated the home was hers and that she intended to build a home on the south side." (Tr. 173)

In line with these declarations that the grantor deeded the property to the grantee, the grantee upon her mother's death on March 24, 1939, went into exclusive possession of the property. Upon her marriage to the defendant it became their home and they held it out to the world as such. They lived in it until her death, March 16, 1945, nearly 7 years, and during this period none of the plaintiffs ever asserted any rights in the property. And had the grantee lived they undoubtedly would still be occupying it. Not only did they occupy the property but they improved it as hereinbefore mentioned. The use was in line with unconditional ownership. (Tr. 63, 64, 173, 174, 183, 185, 210, 216)

It is difficult to understand plaintiffs' position that they claimed any interest in the property and that it was deeded by

their mother to their sister in order to avoid probate in view of the fact that they permitted her together with her husband to occupy it for 7 years without asserting any interest therein. Acquiescence in this occupation was not consistent with the position they took when they formed a delegation and called on the defendant two or three days after his wife's funeral to make demands on him that he turn the property over to them. Although they said the property was theirs they never stated that their mother had conveyed the property to Amber for the purpose of avoiding probate and that she had promised her mother to divide it with them. (Tr. 120, 121, 127, 132, 138, 142, 143)

That Amber had been of great help to her family from the time she started working as an adult is apparent, not only from the testimony of the defendant's witnesses but from the plaintiffs' also, and this is further indicated by the fact that she paid the funeral expenses of Noble Haws, the father of the plaintiffs in 1941. Although one of the plaintiffs testified that the money for the paying of the funeral expenses of the brother came from money her mother had saved, it would appear that such is most unlikely for during these years she was being taken care of by the Welfare Department. As a matter of fact, the Welfare Department paid $75.00 towards her own burial. (Tr. 161, 167, 168, 171, 199, 201; Exhibit 6)

These facts alone would indicate that the conveyance of this property to her daughter, Amber, was without any conditions whatsoever and entirely in line with the testimony as given by defendant's witnesses, to the effect that the grantee's mother had given her the property.

Another outstanding piece of evidence in this case that makes it definitely appear that the property was given to the grantee without any conditions being attached: That is in 1935 the property was sold to Cache County for failure to pay the taxes assessed thereon, pursuant to which the grantor wrote to the grantee telling her that the property was being taken over by the county, that if she didn't send her $100.00 to pay the taxes that it would be sold. She sent the money for this purpose, and the county, on its payment, conveyed the property back to the grantee, by quitclaim deed on the 29th of May, 1936. (Tr. 182, 183; Exhibit 2, entry 16)

Garland Haws, one of the plaintiffs, testified that he handled this transaction with the county. In this respect he testified:

Q. Who paid that $100.00?
A. I paid it.
Q. Did you receive any part of it from Amber Haws Jensen?
A. I don't remember as I did. I wouldn't be sure but I don't remember. (Tr. 253)

This is not a denial of the defendant's testimony that the grantee sent the $100.00. If anything, it is an admission. If Garland Haws had paid the money himself he would have remembered it. This was in a day when $100.00 had some purchasing power.

Another surprising thing about this case is that the plaintiffs, Hermoine Rose and Lucinda Ballam, until after the death of their sister were residents of California, and yet it was from these witnesses and their husbands that came all of

the testimony of the plaintiffs themselves regarding purported conversations with their mother and Amber, the grantee, about this transaction. None of the evidence regarding the conveyance came from their brother, Garland Haws, who lived in the same town as his mother, and his sister, the grantee, after she had returned to care for her mother. Yet he did not testify regarding any conversation with either grantee or grantor, whatsoever. You can search his testimony from one end to the other and you will not find any testimony by him regarding the transaction in question. It is indeed strange that neither his mother nor sister discussed with him the particulars of this conveyance. Especially is this true in view of the fact that he handled the transaction wherein, in effect, he redeemed the property in question for his sister, the grantee. Certainly he must have asked his mother why the property had been conveyed to his sister. His silence must speak that any answer would have been fatal to his cause. (Tr. 135-140, 252, 256)

IF THERE WAS A TRUST THE COURT ERRED IN ORDERING THE DEFENDANT TO CONVEY ALL OF HIS RIGHT, TITLE AND INTEREST IN THE PROPERTY TO A TRUSTEE BECAUSE AS AN HEIR TO THE GRANTEE HE IS ENTITLED TO A ONE-SIXTH INTEREST IN THE PROPERTY.

It is the defendant's seventh contention, Assignments of Error No. 11, 12 and 14, that the findings of fact are so uncertain and indefinite that it cannot be determined what trust, if any, was created by the actions of the parties and what interest, if any, the plaintiffs and the defendant have in the

property in question. In the first instance, the court found that the grantee took the property for the use and benefit of the heirs of the grantor on her death; however, it failed to find the respective interests the heirs were entitled to. It then found that the purpose of the conveyance was to avoid probate. In line with these findings it entered its conclusions of law and decree appointing a trustee and ordering the defendant to deed to the trustee all of his right, title and interest in the property. (Tr. 26-30)

It would thus appear that the court, although it found the purpose of the trust was to avoid probate it nevertheless finds and decrees that the only heirs who had any interest in the property were the heirs of the grantor and that any interest the defendant might have had as an heir of the grantee was foreclosed, else why did the court require him to deed all of his interest in the property to a trustee? This is contrary to the law and the facts.

The interest of the various parties in the property should be determined in this action. Another one for this purpose should not be necessary. If the grantee held this property in trust for her mother's heirs for distribution on the grantor's death, then as a grantee, being her mother's heir she would be entitled to one-sixth interest therein, and this interest has now passed to the defendant. Under any theory of the case he is entitled to have the court decree that he has a one-sixth interest in the property and the court unquestionably erred in ordering that he convey all of his right, title and interest in the property to a trustee.

IF A TRUST EXISTED IT WAS REPUDIATED BY THE GRANTEE MORE THAN THREE YEARS PRIOR TO COMMENCEMENT OF THIS ACTION, AND THE CAUSE OF ACTION, IF ANY, WAS BARRED BY SUB-SECTION 3, 104-2-24 U.C.A. 1943.

It is the defendant's eighth contention, Assignment of Error No. 15, that plaintiffs' cause of action, if any, is barred by the Statute of Limitations, sub-section 3, 104-2-24 U.C.A. 1943. It is as follows:

> (3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

The undisputed evidence in this case established that the grantee, upon her mother's death, March 24, 1939, and thereafter until the grantee's death, March 16, 1945, exercised exclusive possession of the property, paid the taxes, held it out to the world as her home and in the years 1940 and 1941 made various improvements in line with ownership of which plaintiffs had notice. (Tr. 63, 64, 173, 174, 183, 185, 210, 212)

The cause of action in question, if any, is one sounding in fraud — fraud in the inception — and thus it is controlled by subsection 3, 104-2-24 U.C.A. 1943. Such is the effect of the Utah case, Davidsen v. Salt Lake City, 81 P. 2nd 375, 118 A.L.R. 195. In this case the action was commenced to set aside a deed on the ground of fraud in its procurement and the court held, in an opinion by Mr. Hoyt, District Judge, that in such

case the 3-year Statute of Limitations applied and not the statute relating to actions for the recovery of real property. The court said:

> But if his relief in each case depends as here upon the cancellation of a deed for fraud or mistake, he must bring his action within the period provided by law for an action based upon that ground. It would be extremely mischievous if a person claiming to be a victim of fraud or mistake were permitted to delay bringing his action until nearly seven years after discovery of the fraud or mistake upon which he relies.

As to the question of notice this court, in the case of Salt Lake City v. Salt Lake Investment Co., 134 P. 603, 43 Utah 181, said:

> In Shain v. Sresovich, 104 Cal. at page 405, 38 pac. at page 52, the Supreme Court of California, in passing upon the effect of a statute of which the portion we have quoted above is an exact transcript, says:
>
> "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence."

As to the question of notice, also see the Utah case of Gibson v. Jensen, 158 P. 426, 48 Utah 244; Smith v. Edwards, 17 P. 2nd 264, 81 Utah 244.

And as to when the Statute of Limitations begins to run in such an action, the Supreme Court of Arizona, in the case of Jack Waite Mining Co. v. West, 101 P. 2nd 202, said:

(1-3) We consider this last contention of defendant first, for if it be correct and applicable to the facts, there is no need for us to go further. We think it is the law that where the trustee of an express trust, to the knowledge of his cestui que trust, repudiates the trust and converts the property, the statute then begins to run. Nor do we understand that plaintiff questions this. We also think the better reasoning is that even though plaintiff may not have notice of the specific repudiation of the trust, yet if he knows facts from which a reasonable man would be put on notice that the trust has been, or is about to be, repudiated, this is equivalent to actual notice of the repudiation. A cestui que trust should not be permitted to shut his eyes and refuse to recognize a plain warning of danger, and then claim that he had no knowledge of the catastrophe when it comes. Weniger v. Success Mining Co., 8 cir., 227 F. 548.

And to the same effect is the Supreme Court of Montana in the case of State ex rel. Central Auxiliary Corporation v. Rorabeck, County Treasurer of Golden Valley County, et al. (Phillips Inv. Co. et al., Interveners), 108 P 2nd 601.

The court said:

(5, 6) It is generally held that as between the trustee and the beneficiary of a trust, the statute of limitations does not run until the trust has been repudiated and notice of repudiation received by the beneficiary. Blackford v. City of Libby, supra; City of New Orleans v. Warner, 175 U.S. 120, 30 S. Ct. 44, 44 L. Ed. 96. The rule is succinctly stated in 4 Bogert on Trusts and Trustees, pag 951, as follows:

"The true rule with respect to the statute of limitations and express trusts is more clearly stated as follows: During performance of the express trust there

> is no cause of action for breach and so the statute of limitations has no bearing on the rights of the cestui; but, if the trustee violates the trust and the cestui knows of such conduct, or could have learned of it by the use of reasonable diligence, the court will apply the statute of limitations which governs equitable causes of action or an analagous statute concerning legal causes of action. To cause the statute to begin running during the life of the trust there must be some act of repudiation of the trust by the trustee, as where he declines to account to the cestui, takes trust income for his own purposes, or sets himself up as the owner of the trust capital."
>
> Also see Mayse v. Mineola Co-op Exchange, 30 P. 2nd 120.

From the facts in this case it undoubtedly appears that if the grantee fraudulently procured the conveyance of this property upon a promise to hold it for the use and benefit of the plaintiffs, for the purpose of distribution upon her mother's death in order to prevent probate, that her use of the property for 7 years thereafter in a manner as indicated would certainly be notice to the adverse parties. If it was the agreement distribution should have been made on her mother's death, or within a reasonable time thereafter, and a party under such circumstances goes into possession, occupies the property, and holds property out to the world as hers and her husband's and makes improvements thereon, certainly the adverse parties have notice of a breach of trust.

CONCLUSION

In conclusion we desire merely briefly to say that the evidence in this case not only fails to establish a trust but that the plaintiffs have failed to establish by clear, definite, unequivocal and conclusive proof that Amber Haws received this property from her mother subject to any conditions whatsoever. In any event we believe that the security of titles and the equities of this case demand that the decree of the district court be set aside and that the court find the property vested in the defendant free and clear of all encumbrances and not subject to any demands or claims of the plaintiffs whatsoever.

Respectfully submitted,

NEWEL G. DAINES
L. DELOS DAINES
CLINTON D. VERNON

Attorneys for Defendant and Appellant.